Reparation Orders of the Interstate Commerce Commission: Their Enforcement in the Courts.—The nature of an award of reparation by the Interstate Commerce Commission, and the procedure by which it may be enforced is very fully reviewed by the Circuit Court of Appeals for the Third Circuit in the case of the Lehigh Valley R. R. Co. v. Clark.[1] The question of whether the order made out a prima facie case of liability against the carrier was very directly presented, for the complainant merely relied upon the Commission's order of award, and the carrier introduced no evidence. The Court held that the facts stated in the order were insufficient to make out a prima facie case for the complaining party, and further, that the mere fact that the Commission had found the rate charged unreasonable, and established a lower rate as reasonable for the future, did not entitle the complainant to the difference between the two rates as damages.

The history of reparation orders and the means provided for their enforcement is an interesting one. As the Act originally stood,[2] section 14 required findings of fact in every investigation made by the Commission, and made such findings of fact prima facie evidence in all judicial proceedings. Section 16 provided for the summary enforcement of orders of the Commission in Equity, making no distinction between reparation and other orders of the Commission. As the Constitutional right to trial by jury[3] attaches to the enforcement in a Federal Court of an order for pecuniary reparation, such an order cannot be enforced by equitable procedure.[4] The Commission itself recognized the futility under such circumstances of making an order awarding reparation, and uniformly declined to do so.[5]

By amendment to section 16, in 1889,[6] this Constitutional objection was removed by providing for the enforcement of reparation orders by a suit at law, where a jury trial could be had at the request of either party. Section 14, however, still required findings of fact in all orders. This necessity of making findings of fact was removed by amendment of section 14 in 1906[7] in the case of non-reparation orders alone, and as to proceedings for the enforcement of reparation orders, it was provided in Section 16 that the suit should proceed in all resepcts like other civil suits for damages, except that findings and orders of the Commission should be prima facie evidence of the facts therein stated.

It is to be observed that loss of or damage to goods constitutes no violation of the Act, and hence the Commission has no power

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[1] (1913) 207 Fed. 717.

[2] Act of Feb. 4, 1887 C 104, 24 Stat. 379, 384.

[3] U. S. Constitution, Amend. 7.

[4] I. C. C. v. West N. Y. etc. R. R., (1896) 82 Fed. 192, 195.

[5] See cases decided by Commission cited in West N. Y. etc. R. R. Co. v. Penn. Ref. Co., (1905) 137 Fed. 343, 350.

[6] Act of Mar. 2, 1889 C 382, Stat. 855, 859.

[7] Act of June 29, 1906 C 3591, 34 Stat. 584, 589, 590.

[8] Blume v. Wells Fargo, (1909) 15 I. C. C. 53.

to award reparation in such a case;[8] but the Act to Regulate Commerce has so far supplanted common law remedies that in every case in which the unreasonable or discriminatory character of a rate, regulation or practice of the carrier is the basis of the action, the shipper has no redress in any Court until the Commission has declared it unreasonable.[9] Where, however, the violation of the Act consists of a departure from the rates established and on file with the Commission, resort to that body is not a condition precedent to redress in the Courts, because so long as the rate filed is in force, it must be treated as though it were a Statute, binding as such upon railroad and shipper alike.[10]

In a proceeding to enforce an award of the Commission the provisions of the Act do not make the order prima facie evidence of the liability of the carrier, but only of the facts stated in the order and findings;[11] the opinions, conclusions and arguments of the Commission that may be contained in the order must be excluded from consideration.[12] On the issue of damages, the special facts out of which they arose must be shown.[13] The mere fact that the Commission has declared what constitutes a reasonable rate for the future is not sufficient to establish the excessive character of the rate actually charged.[14] The Commission itself has recognized that where it finds that the ends of justice require the reduction of a rate of which complaint is made, reparation to the complainant does not follow as a matter of course, but is to be granted or refused with reference to the special circumstances of the case.[15] Hence it is obvious that in a proceeding to enforce the award there is no basis for estimating these damages unless the special circumstances which entitle the complainant to them are placed before the jury. The principle that a complaining party cannot base his right to damages on a mere showing that the carrier has violated the Act has been frequently announced. Damages cannot be arbitrarily measured by the amount of a rebate,[16] nor is the amount of a discrimination in itself a proper measure of damages.[17] Owing, however, to the binding nature of a tariff on file with the Commission, if the rate charged is in excess of the tariff charge, the shipper is necessarily entitled to at least the difference between the rate unlawfully exacted and the rate on file.[18]

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[9] Tex. & Pac. R. R. Co. v. Abilene Cotton Oil Co., (1907) 204 U. S. 426; Mitchell Coal Co. v. Penn. R. R. Co., (1913) 230 U. S. 247; Morrisdale Coal Co. v. Penn. R. R. Co., (1913) 230 U. S. 305.

[10] Penn. R. R. Co. v. Inter. Coal Min. Co., (1913) 230 U. S. 184, 197.

[11] Darnell etc. Lumber Co. v. S. P. Co., (1911) 190 Fed. 659.

[12] West N. Y. 2 P. R. R. Co. v. Penn. Ref. Co., (1905) 137 Fed. 343, 351.

[13] Lehigh Val. R. R. Co v. Clark, (1913) 207 Fed. 717.

[14] Darwell etc. Lumber Co. v. S. P. Co., (1911) 190 Fed. 659, 663.

[15] Farmers' Warehouse Co. v. L. & A. R. R. Co., (1907) 12 I. C. C. Rep. 547.

[16] Parsons v. C. & N. W. R. R. Co., (1879) 167 U. S. 447.

[17] Penn. R. R. Co. v. Inter. Coal Min. Co., (1913) 230 U. S. 184.

[18] Chicago etc. R .R. v. Feintuch, (1911) 191 Fed. 482.

The marked difference between the weight given to a non-reparation order of the Commission[19] and that given to an order awarding damages seems to be attributable to the difference in the nature of the power which the Commission is exercising in each respective case. When the Commission fixes a rate as reasonable for the future, its Act, while not legislative in the sense that the delegation of such power by Congress is unconstitutional,[20] is yet legislative rather than judicial;[21] on the other hand, the Commission's order of reparation is not made in the furtherance of the interests of the public generally, but is made in pursuance of a power, the exercise of which goes no further than to enforce private rights. Hence in order to secure the judicial enforcement of an award of reparation the Court must have before it (1) the fact that an excessive or discriminatory rate was exacted, and (2) evidence of damage suffered thereby.

S. R. S

Sales: Implied Warranty.—Sour grapes are proverbially not in demand and the buyer in the case of Pfoh v. Porter[1] decided by the Appellate Court for the Third District proved no exception to the general rule He had examined the grapes on the vines and decided that they showed great promise of becoming table delicacies, and with this particularly in mind, contracted for their purchase, delivery and payment to be made when the grapes were ripe. The contention arose over a portion of the grapes which a rainstorm had rendered mouldy and left the question of their fitness for market a matter of debate. The trial court found that the evidence in the case justified a holding that there had been an express warranty that the grapes would be merchantable and fit for table use, or that it should be inferred from the other terms and conditions. This finding was upheld by the Appellate Court. If the decision rested merely on the fact of an express warranty, which was not complied with, it would hardly attract attention. "But, regardless of any express agreement to that effect, under the authorities, a warranty is presumed from the nature of the transaction." This statement of the court, though dictum, may seem to give force to the proposition that there is an implied warranty of merchantability in an executory contract for the sale of grapes, on the vines, after they had attained most of their growth, and were, as best can be gained from the case, within a month of ripeness and complete maturity, and had been inspected by the purchaser. It is, therefore, proper to give the question some consideration.

The principle is not concluded by the authority of the cases cited by the Court, which involve executory contracts of sale with warranties of merchantability but are readily distinguished on the facts.

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[19] See Union Pac. R. R. v. I C. C., (1912) 222 U. S. 541, 547.
[20] I. C. C. v. Goodrich Trans. Co., (1912) 224 U. S. 194, 214.
[21] Prentis v. Atl. Coast Line Co., (1908) 211 U. S. 210, 226.
[1] (October 21, 1913) 17 Cal. App. Dec. 409.